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University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published During the Academic Year by the University of Pennsylvania Law School,
34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 61

JANUARY, 1913

NUMBER 3

SOME POWERS AND PROBLEMS OF THE FEDERAL ADMINISTRATIVE¹

A dawning progressive era, with its new conception of federal responsibility to the general welfare, daily emphasizes the increasing vital importance of the administrative function in the federal government. Whether it be the establishment of a Children's Bureau,² foreshadowing, let us hope, the federal regulation of interstate commerce in child labor products, or whether it be an elaborate system for the regulation of radio communication,³ or merely a "phossy-jaw" act, imposing a prohibitory tax on white phosphorus matches,⁴ or the establishment and enforcement of a national standard for barrels of apples,⁵ each succeeding Congress witnesses some new and significant responsibility imposed upon the administrative system, and touching more or

¹ This article is an elaboration of an address before the Sharswood Law Club of the University of Pennsylvania, at its Annual Banquet, 1912.

² Act Apr. 9, 1912, Vol. I. Sessions Laws, 2nd Sess., 62nd Cong., Chap. 67, pp. 79-80.

³ Act Aug. 13, 1912, Vol. I. Sessions Laws, 2nd Sess., 62nd Cong., Chap. 287, pp. 302-308.

⁴ Act Apr. 9, 1912, Vol. I. Sessions Laws, 2nd Sess., 62nd Cong., Chap. 76; pp. 81-84.

⁵ Act Aug. 3, 1912, Vol. I. Sessions Laws, 2nd Sess., 62nd Cong., Chap. 273; pp. 250-251.

less intimately a large portion of the people. The vexing problems of the future will no longer be the great constitutional problems of ascertaining what *may* be done, or even the broader political problems of deciding what *should* be done, but will be the purely administrative problems of establishing really effective ways and means of carrying out the people's will.

A correct appreciation of the position of the administrative in our constitutional system is therefore a matter of increasing importance alike to all whose duty it is either to make, to enforce, to interpret or merely to obey the laws, though the subject, strangely enough, is one which several causes have contributed to obscure.

For the one thing, the growth of the federal administrative system has been comparatively slow and singularly free from oppressive features calculated to arouse public hostility or criticism. Then too, for one reason or another, perhaps chiefly because few persons have opportunity or occasion to observe closely more than one small feature of its operation at a time, the whole field of the federal administrative seems to have taken on itself in the mind of the average lawyer, hardly less than of the average lay man, an atmosphere of strangeness and almost of mystery.

Finally, there has always been present the natural and proper reluctance of the American, born of his jealously guarded Anglo-Saxon principle of equality before the law for citizen and sovereign alike, to tolerate the existence, or the suggestion of the existence, of any separate science or jurisdiction of administrative law, such as is reflected in the *droit-administratif* of continental Europe, a reluctance natural to the genius of our political system, but not calculated to encourage definiteness or familiarity of outline in the principles guiding federal administrative development.

It is the purpose of the present article to illustrate in a general way the constitutional limitations of this development, to indicate its present tendencies, to suggest and discuss a few of its problems, and to measure, to some extent at least, the promise of its future.

The principal restrictions of the Constitution limiting the otherwise unlimited power of Congress in the matter of adminis-

trative methods for the conduct of the government's business are to be found in the familiar doctrines of the separation of powers and due process of law.

The former of these principles, otherwise than in the case of the Constitution of many states, is not specifically defined in the federal Constitution, but is deduced from the various clauses separately creating and defining executive, legislative and judicial powers.⁶ In effect, it declares that these several powers shall be vested in separate and independent governmental organs and that one shall not encroach upon the powers of another.

In practice however, we find that this great principle, the contribution to political science of the statesman Montesquieu, cannot be and has not been rigidly interpreted. The exigencies of practical government demand that each department shall exercise to a greater or less degree functions of a character strictly belonging to the other two branches of the government, and as was happily said by a North Carolina judge:⁷ "While the three powers ought to be separate and distinct, the science of government is a practical one and it is not to be forgotten that the three coördinate parts *constitute one brotherhood whose common trust requires a mutual toleration in respect to the borders of their several domains.*"

This "mutual toleration" is indeed conspicuous in the federal system, where we find an ever-increasing tendency on the part of the courts to support the right of Congress to lean upon the administrative for the supplementing of legislation in all those matters where the administrative is peculiarly qualified for that purpose, as also the right of Congress to impose judicial duties upon administrative boards and tribunals, and the concurrent right to authorize the administrative branches of the government to proceed with the enforcement of the laws entrusted to their care by administrative *process* closely resembling that commonly recognized as judicial.

So too with the other great principle of due process of law, a phrase of which the Supreme Court itself has said that few are "so elusive of exact comprehension as this," and of which no

⁶ *Calder v. Bull*, 3 Dall. 386.

⁷ *Brown v. Turner*, 70 N. C. 93, 102.

more complete definition seems to exist today than is to be found in the familiar phrase from Magna Charta, "the law of the land."⁸ The spirit of the interpretation of this principle in matters of administrative methods is finely reflected in the oft quoted and inspiring language of Mr. Justice Matthews, speaking for the Supreme Court, in the case which sustained the right of a state to alter the established rules of jury trial: "There is nothing in Magna Charta rightly construed as a broad charter of public right and law which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our situation and system will mold and shape it into new and no less useful forms."⁹

It would be a waste of time, however, to go farther and to seek to define in the form of abstract statements the rules of law, deducible from these general principles, which control the extension of the administrative powers of the government. The subject is by its very nature one in which illustration is the only satisfactory definition, and I purpose rather to present briefly, in concrete form, illustrations of some of the more characteristic and recent phases of administrative development, with a few observations on their practical operation.

Before doing so, it is worth while to bear in mind that administrative power, (as Professor Goodnow points out in a very valuable and suggestive little volume,¹⁰ significantly enough, the only serious attempt at a scientific outline of the subject which has yet appeared in this country), falls logically into two classes, the first concerning itself with the *expression*, and the second with the *execution*, of the will of the state.

Of course, broadly speaking, the general will of the state is

⁸ Davidson v. New Orleans, 96 U. S. 97, 101; also see article on Judicial Construction of Fourteenth Amendment by Francis J. Swayze, *Harv. Law Rev.*, Nov., 1912.

⁹ Hurtado v. California, 110 U. S. 516.

¹⁰ Principles of the Administrative Law of the United States, by Frank J. Goodnow, LL. D., Putnam's, 1905.

and must be primarily expressed by its law-making body, but this expression must be supplemented by administrative action in two particulars: first, in the matter of "filling in the details" of legislative acts, as for instance by the adoption of regulations having the force of law; and second, in the matter of applying the will of the state thus expressed to the individual cases as they arise,—a process involving first an administrative ascertainment of facts in a particular case, and thereafter an application to those facts of the appropriate rules of law. The two functions—the one touched with a legislative character, the other with a judicial, are of course readily distinguishable.

Still greater, however, is the distinction when we pass from the realm of *expression* to that of *execution*,—that is to the realm of the active forcible interference by the government with the absolute freedom of the individual.

Now while some summary remedies are enforceable *in propria persona* by the citizen who has been wronged by his fellow citizen, for the most part such interference can be accomplished only by judicial process,—the orderly formal process of the courts of law enforcing their decrees by the issuance of ordinary and extraordinary writs, served and executed by sheriffs and marshals. Conceivably the state might also have been confined to such processes. From early days, however, it has been recognized that these processes were wholly inadequate to the prompt and efficient enforcement of laws vital to the very existence of government. True the courts could enforce the criminal law and thus preserve to the state a right to sanction obedience to its laws, or they could entertain civil suits against the citizen for disobedience to the laws; but these methods were plainly calculated to afford no more than a partial and tardy remedy for a wrong already done to the state and which the public welfare imperatively demanded should be wholly prevented, or summarily redressed. And thus there were developed, of political necessity, the purely administrative processes to which we shall refer.

In the illustrations to follow I have not made any attempt to separate instances of administrative *expression* from those of *execution*; the two functions being often naturally included as co-ordinate parts of a single administrative system. The distinction, however, is well worth keeping in mind as we proceed.

As might have been expected, one of the earliest conspicuous tests of the administrative principle arose in respect to a matter where the necessity for strong administrative control admitted of no argument—the collection of taxes. The experience of the confederation sufficiently emphasized the truth, early proclaimed by the Supreme Court, that the prompt payment of taxes was vital to the existence of the government. And so we find that tribunal consistently maintaining throughout our history not only the administrative right to determine what taxes were due—a function of *expression*—but also the right to adopt summary extra-judicial process of distraint for their collection—a function of *execution*. “The idea that every tax-payer is entitled to the delays of litigation is unreason,”¹¹ are the expressive words of Justice Swayne, and no such delays have been permitted in the federal system.

In an early case¹² involving the collection by distress from a government officer of an amount owed by him to the government, it was strongly urged that the auditing of the account, the ascertainment of the balance due, and the issuance of process, constituted an exercise of judicial power. In denying the force of this contention, the court conceded that the auditing of accounts and ascertainment of money due was “in an enlarged sense a judicial act,” but in significant language pointed out that “so are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law.” This was simply one of those matters, said the court, which might have been made a subject of either judicial or administrative consideration, at the option of Congress, and Congress having chosen the latter course, its decision would not be interfered with by the courts.

These general administrative powers were further supplemented by the proposition that the courts would not, save in exceptional cases of great importance, such as those which involve threatened irreparable injury or cloud on the title of real estate, interfere by injunction with proceedings under such process, and never for the mere purpose of questioning the legality of the tax

¹¹ Springer v. U. S., 12 Otto 586, 594.

¹² Murray's Lessee v. Hoboken Land and Improvement Co., 18 How, 272, 280.

assessed. Said the Supreme Court: "It is a wise policy. It is founded in the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and often modes of procedure are necessary, than those which belong to courts of justice."¹³

As the allowance of a suit against the government is "an act of beneficence,"¹⁴ and as the government may, as stated, adopt the administrative methods of distress for the collection of a tax supposed to be due, it results that the administrative branches *may* be clothed with full and complete power both for the determination and collection of taxes due.

As a matter of common justice, however, rather than of constitutional necessity, Congress has provided "both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid."¹⁵

The same principles are strikingly emphasized in the matter of the collection of the customs revenue. In this instance, however, the hands of the administrative have been further strengthened by the recognition of the broad principle of the govern-

¹³ State Railroad Tax Cases, 92 U. S. 575, pp. 613-614. See also the following significant expressions:

"It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or officer employed for their collection or disbursement, to become subjects of judicial controversy according to the course of the law of the land." Curtis, J., in *Murray v. Hoboken Land, etc. Co.*, *supra*, 18 How., p. 282.

"If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." Miller, J., in *Chatham v. United States*, 92 U. S. 89.

¹⁴ *Nichols v. U. S.*, 7 Wall. 122, 127.

¹⁵ State Railroad Tax Cases, *supra*, at p. 613.

ment's peculiar control over commerce, a control so comprehensive that, to use the words of the Supreme Court, no individual has a "vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what merchandise may be imported into this country and how the right to import may be exercised."¹⁶ Under this broad power, the courts have uniformly supported the finality of the decisions of the government administrative officials in the matter of the *appraisement* of merchandise, on the principle that "the interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion and embarrassment."¹⁷ The complete justification of this policy is well illustrated in the splendid record of the Board of General Appraisers.

On the side of the *classification* of merchandise, however, as distinguished from its *appraisement*, we are confronted with an interesting and very instructive contrast in the matter of governmental policy.

Under the principle above illustrated it would undoubtedly be competent for Congress to place in the hands of an administrative board, such as the Board of General Appraisers, the final decisions of all questions of *classification* equally with those of *appraisement*. To quote the words of our own great judicial president, when on the bench of the Circuit Court of Appeals for the 6th Circuit in 1898, Congress "may, if it sees fit, make the Secretary of the Treasury the *final arbiter* in any class of cases arising under the revenue laws, to determine in a quasi-judicial manner whether, *by virtue of those laws*, any claim against the government has arisen in favor of the petitioner,"¹⁸ and what the Secretary could do, undoubtedly a board specially delegated by Congress for that purpose could do.

In view, however, of the large financial interests often affected by decisions on classification, and of the further fact that such

¹⁶ *Buttfield v. Stranahan*, 192 U. S. 470; *The Abby Dodge*, 223 U. S. 166, Feb. 10, 1912.

¹⁷ *Bartlett v. Kane*, 16 How. 263.

¹⁸ *Ferry v. U. S.*, 85 Fed. 550, 553; see also *U. S. v. Shipley*, 197 Fed. 265, 269, C. C. A. 3rd Cir. Gray J.

decisions frequently involve matters of legal construction, as well as of definition, Congress has seen fit from the first, to grant a universal appeal to the federal courts from all decisions of the Board of Appraisers involving such questions. The working out of this policy, however, hardly seems to have justified the high judicial character in which it has been clothed.

Prior to 1890 all questions as to the classification of imported merchandise were triable before a jury, and from then on until the establishment of the Court of Customs Appeal in 1909, such questions were triable in the Circuit Courts without a jury, subject to appeal as of right (a right, it is to be observed, universally availed of in all cases of the slightest importance) to the Circuit Court of Appeals, and to occasional review by the Supreme Court in cases of exceptional importance.

The result was to throw upon the local federal courts of at least a dozen different and often widely separated districts, a vast and burdensome mass of litigation involving questions of a character peculiarly adapted to induce difference of judicial opinion and in a very large measure entirely matters of commercial definition.

Hopeless confusion of decision speedily resulted and also a worse evil in the coöperation of customs brokers and their attorneys to encourage delay in the final decisions of important questions, pending the accumulation of a large volume of protests on similar importations and the resultant creation of a large stake dependent on the termination of the litigation, the benefits of which if successful were divided between broker, importer, and attorney, and seldom if ever inured to the benefit of the purchasing public.

It was largely to correct these abuses and the delay and uncertainty of conflicting decisions, that the Customs Court was established, and the necessity for its establishment is a striking illustration of the evil of a too generous extension of judicial procedure into administrative fields.

To the writer, who for some six years spent many weeks of every year in the preparation and trial of such cases in the district and appellate courts, it seems clear that the interests of the importer, and certainly the interests of the public, would have

been much better subserved from the beginning, had all questions of classification, not involving some purely legal or constitutional aspect, been submitted, like all matters of appraisement, to the speedy and final determination of the Board of United States General Appraisers, a singularly able body composed of nine lawyers and experts, whose history has been unmarked by scandal or serious criticism. Indeed it is interesting to note that the members of this Board receive salaries of \$9,000, larger than that of the federal district judges, and that on the creation of the new court the President of the Board was selected to preside over the new court, which is in effect but a dignified Board of Appraisers.

Another strong expression of the administrative power in matters relating to the collection of the customs revenue is found in the unhesitating sanction given by the Supreme Court in 1903¹⁹ to the final authority vested by the Tea Inspection Act in the Secretary of the Treasury to establish standards of imported tea upon the recommendation of the Tea Board, an administrative body of nine experts.

This was a function of the administrative *expression* of the will of the state. On the side of the *execution* of that will however, the same opinion written by the present Chief Justice also contains an important declaration upholding, in the face of the most vigorous objection, the provision of the Act commanding the administrative destruction of teas not exported within six months after their final rejection.

An interesting echo of this same power is to be found in a feature of the recent Pure Food Act, which has been little brought to public attention, and under which the Secretary of the Treasury is authorized to refuse delivery and cause destruction of misbranded and adulterated goods, sought to be imported and which are not exported or bonded within three months, the Secretary being at once the judge of the misbranding and adulteration, and the executive arm to carry out the will of the state by the summary administrative process of destruction without the aid of the courts, a salutary administrative power under which every year

¹⁹ *Buttfield v. Stranahan*, *supra*.

many thousands of dollars worth of deleterious food products are either exported or destroyed.

This provision of the Act has not been passed upon by the courts, but in a recent unpublished decision²⁰ under the Plant Quarantine Act of 1912, Judge Hough in language whose "modern" temper is frankly conceded, sustains in no uncertain terms the right of the Secretary of Agriculture to enforce without interference from the courts the provisions of the act directing that official to exclude the plant products imported from the countries where he shall have found after "public hearing" certain plant diseases to exist. In denying the complaint that the Secretary had abused his discretion in the matter of notice of hearing, Judge Hough tersely remarked: "Speed was necessary and summary action justifiable," a conclusion entirely in accord with the declaration of the court that the matter was not one of judicial investigation, but "political—in a wide, but entirely proper sense of the word."

The epoch-making labors of the Interstate Commerce Commission illustrate the same principle and are too familiar to require special notice here. It is sufficient to note that the recent decisions of the Supreme Court in substance declare that the findings of the Commission as to the reasonableness of rates and the existence of discriminations are subject to review only when they involve the application of an erroneous rule of law, though wherein lies the distinction under the Act between questions of law and fact is a problem which for some time past has been puzzling many of the ablest jurists of the country.²¹

In sharp contrast to the example of "judicial administration" under the customs law above discussed, the broad subjects of

²⁰ U. S. v. 200 Bags of Potatoes (Nov. 4, 1912), not yet reported. Circular 66, Solicitor Dep't. of Agriculture.

²¹ See a very able and suggestive article by Henry Wolf Bickl , Esq., in the U. of P. Law Review, Oct. 1911, pp. 1-18, on the "Jurisdiction of Certain Cases arising under the Interstate Commerce Act," in which the author points out "that the power lodged in the members of the Interstate Commerce Commission, touching, as it does the daily life of all the people and affecting intimately the commercial relationship of cities and communities generally, discloses a vesting of authority in individuals to an extent hitherto unknown in these United States." Also recent and important decision of Supreme Court in *Proctor & Gamble Co. v. U. S.*, 225 U. S. 282 (June 7, 1912).

pensions and land grants furnish excellent illustrations of deliberately and carefully designed administrative systems, exclusive of judicial review.

Fortunately for the federal courts, pension cases do not and cannot fall within their jurisdiction. The widow of Admiral Decatur felt aggrieved, and for all we may know, justly so under the law, at the denial of her plea to be entered on the pension rolls, and in due course her grievance found its way to the Supreme Court, where, in declining to entertain her petition, Justice Taney used these significant words:²²

"The interference by the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but evil, . . . the interposition of the courts might throw the pension fund and the whole subject of pensions into the greatest confusion and disorder."

Equally broad has been the attitude of the courts in the matter of government land grants, into whose validity they have uniformly declined to inquire except on the ground of want of jurisdiction; for otherwise, said the Supreme Court, in language strikingly suggestive of the situation which obtains today in the case of industrial patents, and well worth remembering in every field of administrative legislation, the land patent instead of becoming a means of peace and security to its holder "would subject his rights *to constant and ruinous litigation*."²³

This attitude is most forcibly emphasized by the language of a recent case in which the Supreme Court laid down the proposition that Congress having constituted "the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands," the exercise of these functions is not reviewable by the courts, and that neither an injunction nor mandamus will "lie against an officer of the Land Department and control him in discharging an official duty, which requires the exercise of his judgment and discretion. The Secretary," said the Court, "must exercise his judgment in expound-

²² *Decatur v. Paulding*, 14 Pet. 497, 516.

²³ *Riverside Oil v. Hitchcock*, 190 U. S. 316, 324.

ing the laws and resolutions of Congress,—whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The responsibility, as well as the power, rests with the Secretary, uncontrolled by the courts.”

The broad and exclusive character of the administrative discretion thus reposed in the Land Department has been made the subject of periodical attack. The reader interested in this subject will find the more familiar objections to the administrative powers of this great office well summarized in a debate in the House of Representatives which appears in the Congressional Record for May 14, last. It seems clear that the gigantic tasks imposed upon the Land Office include problems probably more intricate and perplexing than those imposed upon any other administrative bureau of the government, and it may possibly prove that in some instances, Congress has placed upon the bureau some responsibilities which should be shared by the courts. But however this may be, it is not likely that for practical purposes as actually affecting the interests of the public at large and of the settler, the importance of the administrative function will or can be in any great degree really lessened and the problem must always remain essentially an administrative one.

The very broad character of the powers of the Land Department, as above declared, illustrate in its broadest scope the development of a principle which found its origin in the language of Mr. Justice Marshall in the celebrated case of *Marbury v. Madison*,²⁴ and which is of constantly increasing application in departmental matters. The familiar principle in effect declares that when Congress has committed to the heads of administrative departments duties requiring the exercise of judgment or discretion, as distinguished from ministerial duties, their action, whether it involves questions of law or of fact or both, will not be reviewed unless the courts are of opinion that the officer has exceeded his statutory authority, or that his action was “palpably

²⁴ 1 Cr. 137.

wrong," and that even on a question of law alone, their "action will carry with it a strong presumption of its correctness."²⁵

The furthest extent to which this power of review will be exercised seems to be found in the several cases brought to test the right of the Postmaster-General to deny admission to the mails as second class matter of publications claimed to be entitled to entry as such, or to exclude from the mails matter supposed to be of a fraudulent character. In these cases the Supreme Court has consented to review, and has occasionally reversed, decisions of the Postmaster-General, where it appeared that his action on the conceded facts was a clear mistake of law.²⁶ For the most part, however, the courts, while firmly supporting the principle that the exemption of the United States from suit does not protect its officers from personal liability or injunction process in favor of persons whose rights of property they have wrongfully invaded by an act in excess of authority or under an authority not validly conferred, have been loath to disturb the administrative office in the exercise of its political function.

Another striking illustration of the liberal interpretation placed by the courts on the doctrines of due process and of the separation of powers is found in the judicial history of the federal legislation relative to the enforcement of the immigration laws. In the face of the most persistent opposition, frequently carried to the bar of the Supreme Court, the federal courts have steadfastly recognized that the administration of the laws regulating the admission of foreigners to our country was intended by Congress to be, of necessity should be, and under the Constitution might lawfully be, a purely administrative matter, and that the protection of the due process clause meant no more (and no less) than that every alien was entitled to a fair hearing before a regularly established administrative tribunal.²⁷ As a result of

²⁵ *Bates & Guild Co. v. Payne*, 194 U. S. 106, p. 109.

²⁶ *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Public Clearing House v. Coyne*, 194 U. S. 497; *Omond G. Smith Et al. v. Hitchcock*, Sup. Ct., 31 and 32, Oct. 1912, not yet reported (Nov. 18, 1912); *Philadelphia Company v. Stinson*, 223 U. S. 605. (Mar. 14, 1912).

²⁷ *Japanese Immigration Case*, 189 U. S. 86; *Gonzales v. Williams*, 192 U. S. 1; *U. S. v. Sing Tuck*, 194 U. S. 161, 170. For latest lower court decisions, see 195 Fed. 701; 196 Fed. 372; 196 Fed. 437; 196 Fed. 736; 199 Fed. (Adv. Sheets, Dec. 19, 1912). Also see language of Gray, J., in *Rodgers v. U. S.*, 157 Fed. 381 (C. C. A., 3d Cir.)

this attitude the flood of cases for a long time sought to be carried from the administrative to the judicial forum in the hopes of imposing political and administrative functions on the latter, and at least of benefitting the alien by the consequent delay in deportation with its incident possibilities, has been very materially lessened. The courts will now consent to hear only those cases involving an allegation of a violation of some positive statutory declaration or of an abuse of administrative discretion amounting in substance to a denial of a hearing; and have gone so far as to sustain the right of the immigration authorities, subject to the permitted appeal to the Secretary of Commerce and Labor, to pass finally upon the question of fact as to the place of birth of a person of Chinese descent claiming that he was born in, and therefore a citizen of, the United States.²⁸

It is to be observed that the right which we have just discussed, a right of final decision in a matter involving the *expression* of state will, is also supplemented by the effective *executive* power not only to detain physically by administrative process aliens held at the border of the country subject to examination or to orders of deportation, but also to arrest on administrative warrant, and subsequently to deport, aliens arrested within the United States on the charge of having unlawfully secured entry to the country, or of having become public charges within one year after their admission. The validity of this latter power of arrest on administrative warrant has not as yet been passed on by the Supreme Court but in a recent and able decision by the Circuit Court of Appeals at Illinois, sustaining the right, the Court remarked that while Congress might reasonably have adopted a different rule as to the hearings of aliens who had actually taken up residence, from that applicable to aliens arriving in the country, they had not seen fit to do so, and that the enforcement of the law was "vested exclusively in the designated executive department, for hearing ascertainment of the facts, and rulings thereon, 'without judicial intervention.'"²⁹

It is said that under the rigid enforcement of the law of de-

²⁸ United States v. Ju Toy, 198 U. S. 253.

²⁹ Prentis v. De Giacomo, 192 Fed. 467 (1911).

portation the State of New York alone will probably be saved a million dollars annually in the maintenance of alien paupers.

The firm and altogether beneficial repudiation by the courts of the attempt to impose upon them purely political duties in the matter of passing on the qualifications of alien immigrants suggests, in passing, at least two other duties of a nature more properly political than judicial, and whose performance must often prove burdensome and irritating; first, the duty, or at least the duty as generally accepted, of acting as examining school-master for all applicants for naturalization;³⁰ and second, the duty of personally examining and approving a veritable multitude of petty accounts presented by government officials.³¹ As to the former, all the advantages to be derived from surrounding with the dignity and solemnity of judicial proceedings the induction of foreigners into the rights of citizenship could be equally well preserved without imposing upon a United States District Judge the political duty of ascertaining the applicant's elementary qualifications for citizenship; as to the latter, the duty is either onerous and a misdirection of valuable judicial time and labor, or, as perhaps sometimes happens, if not taken seriously, is equally beneath the dignity of a United States court.³²

But to resume the main thread of our illustration, we note an even more striking example of administrative process than those before discussed, in the provisions of the immigration laws authorizing the Secretary of the Treasury to impose fines on ship owners bringing prohibited aliens to the United States, on its appearing to *his satisfaction* that the disability might have been detected at the port of embarkation by a proper examination—an authority supplemented by the very effective power to enforce payment of this fine by *withholding clearance* of the vessel pending the determination of the question.

³⁰ Secs. 4 and 9, Immigration Act, June 29, 1906, as amended, 34 Stat. L., part I, p. 596.

³¹ Sec. 1, Act. Feb. 22, 1875, ch. 95, 18 Stat. L. 333.

³² For other cases where the federal courts have refused to assume administrative and non-judicial duties sought to be imposed upon them see Hayburn's case, 2 Dall. 409; U. S. v. Ferreira, 13 How. 40; Gordon v. U. S., 2 Wall, 561; *Re Sanborn*, 148 U. S. 222.

The validity of these broad and stringent provisions was stubbornly and bitterly contested in the Supreme Court, but without avail, the Court, in a characteristically trenchant opinion³³ by Mr. Justice White, holding that it is competent for Congress "when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." To the argument that the distinction between judicial and administrative functions could not be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to a judicial tribunal, the great Chief Justice replied: "The proposition magnifies the judicial to the detriment of all other departments of the government;" while to the argument that grave abuses might arise from the mistaken or wrongful exertion by the legislative department of its authority he boldly replied that the contention in effect intimated "that if the legislative power be permitted its full sway within its constitutional sphere harm and wrong will follow, and therefore it behooves the judiciary to apply a corrective by exceeding its own authority," a proposition which "mistakenly assumes that the courts can alone be safely intrusted with power."³⁴

Probably no more interesting extension of administrative powers is to be observed than that which concerns itself with the issuance of departmental regulations and the establishment of standards, a power that has been happily termed by Justice Marshall, the "power of 'filling up the details' of legislative enactment."

The attitude of the federal courts is perhaps best sum-

³³ *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320.

³⁴ Compare the following emphatic language of Mr. Justice Catron in his concurring opinion in *Decatur v. Paulding*, 14 Pet. 497, at p. 522. "Every government is deemed to be just to its citizens; its executive officers, equally with the judges of the courts, are personally disinterested; and why should not their decisions be as satisfactory and final? They must be final in most instances, in the nature of things and the necessities of the government. . . . To permit an interference of the courts of justice with the accounts and affairs of the treasury, would soon sap its very foundation."

marized in the terse and vigorous words of a great Justice of the Supreme Court of Pennsylvania, as subsequently adopted by the Supreme Court of the United States:³⁵

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some facts or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislators must depend which cannot be known to the law making power, and must therefore be a subject of inquiry and determination outside the hall of legislation."

The latest and perhaps most striking illustration of this great power, is to be found in the Forest Reserve Act of 1897, in which Congress, recognizing the impracticability of providing general regulations that would cover the varied needs of the forest reservations of the country, and the necessity at the same time of providing punishment for the infringement of the public rights, provided broadly that the Secretary of Agriculture should have power to "make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . and he may make such rules and regulations and establish such service as will insure the objects of such reservation; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; *and any violation of the provisions of this Act or such rules and regulations shall be punished,*" by a fine not exceeding \$500 and imprisonment not exceeding one year.

This Act granted to the public the privilege of using the forest reserves for all lawful purposes subject to compliance "with the rules and regulations covering such forest reservation" one of which *regulations* as promulgated by the Secretary *prohibited* the grazing of sheep.

On the first argument of the case, the Supreme Court³⁶ was, in March 1910, equally divided in opinion as to the validity of a conviction under this regulation; on a subsequent argument in 1911, however,³⁷ after the membership of the Court had been in-

³⁵ Field v. Clark, 143 U. S. 649.

³⁶ U. S. v. Grimaud, 216 U. S. 614.

³⁷ U. S. v. Grimaud, 220 U. S. 506, May 3, 1911.

creased by three, the Court reached the unanimous conclusion that the regulation in question was a valid exercise of administrative power.

Other significant applications of this principle are to be found in the decisions of the Supreme Court sustaining the right of the Secretary of War to decide finally what are unreasonable obstructions in bridges of insufficient height,³⁸ and the right of the Commissioner of Internal Revenue to decide what brands should be required to be placed upon tubs of oleomargarine subject to federal tax,³⁹ as also the power of the Interstate Commerce Commission to make reasonable rates,⁴⁰ and to prescribe the manner in which accounts should be kept by interstate carriers.⁴¹

On the side of the establishment of standards the principle is also illustrated by the powers of the Tea Board, to which we have referred, as also the power of the Interstate Commerce Commission to fix the standards of uniform height for railroad draw-bars,⁴² and is sooner or later bound to be illustrated by an administrative system for the fixing of food standards.

At the time of the passage of the federal Pure Food Act, unsuccessful attempts were made in both the Senate and the House to give the Secretary of Agriculture power to establish such standards. The attempt was well meaning but too hasty. The objection to it was thus voiced by Senator Lodge: "If we are going to give a Government Board the power to establish standards we ought to do so by careful legislation and not by a paragraph in an appropriation bill in the last days of a short session," but no constitutional objection to such a power was, or is likely to be suggested; and the existence of such a power has been expressly recognized by a recent decision in the Circuit Court of Appeals for the Eighth Circuit.⁴³

³⁸ *Union Bridge Co. v. U. S.*, 204 U. S. 364.

³⁹ *In re Kollock*, 165 U. S. 526.

⁴⁰ *Interstate Commerce Commission v. Chicago Rock Island etc., R. R.*, 218 U. S. 88.

⁴¹ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194. (Apl. I, 1912).

⁴² *St. Louis & Iron Mountain R. R. v. Taylor*, 210 U. S. 281, 287.

⁴³ *U. S. v. 11,150 pounds of butter*, 195 Fed. 657, 667. See also U. S. Revised Statutes, Secs. 2933-2937.

Under the act of 1903, however, the Secretary of Agriculture has been authorized, "in collaboration with the association of Official Agricultural Chemists and such other experts as he may deem necessary, to establish standards of purity for food products," and as standards adopted under this power were in existence at the time of the adoption of the present pure food law, they have been acted on by the department and have been given at least *prima facie* validity by the courts.

To be really effective, however, further authority is necessary, and it seems clear to the writer that the interests of manufacturer and public alike would be benefitted by a carefully established system for the promulgation of standards not only as to foods, but also, to some extent at least, as to labels, by a highly responsible administrative tribunal of the general nature and same high character as the Board of United States General Appraisers. In the case of food, as in the case of imports, what the manufacturer really desires most is to know, and know promptly, what is expected of him, and not to be compelled to pay for this knowledge with the grave hazard to his business reputation involved in a jury trial.

As the law now stands it frequently happens that reputable merchants and manufacturers who find themselves or their goods, as they believe, mistakenly, placed under the ban of the law, are nevertheless forced by the prospect of expense, delay and, most of all, publicity, to welcome an opportunity to plead guilty as inconspicuously as possible to the information against them or to consent quietly to an order of forfeiture of their goods.

This, of course, is a serious evil and it is to be hoped that the near future will develop some less formal and less expensive, but no less responsible administrative system by which every manufacturer may have the opportunity of submitting his contention with the Government, in the first instance, to an administrative tribunal of the character above indicated.⁴⁴

⁴⁴ Since the above article went to press, President Taft, in his Special Message of December 19, has advocated the establishment of some such "tribunal of appeal." Referring to the Remsen Board, created by President Roosevelt, and subsequently abolished, because of a question as to its legality, the President uses this language:

These suggestions looking to administrative efficiency of the Food and Drugs Act suggest the last general class of illustrations of administrative power to which we will refer, to wit: *administrative process* for forfeiture.

While, as has been shown, adulterated goods when detected at the borders of our country, are summarily exported or destroyed, the seizure of adulterated food products carried in interstate commerce requires the preliminary issuance of *judicial* process, a procedure frequently involving delay fatal to the enforcement of the law. It seems clear that there should at least be provision made for administrative seizure as a mode of instituting proceedings, to be followed by the customary judicial proceedings necessary to a condemnation for forfeiture.

"I heartily agree that it was wise to create this Board in order that injustice might not be done. The questions which arise are not generally those involving palpable injury to health, but they are upon the narrow and doubtful line in respect of which it is better to be in some error not dangerous than to be radically destructive. I think that the time has come for Congress to recognize the necessity for some such tribunal of appeal and to make specific statutory provision for it. While we are struggling to suppress an evil of great proportions like that of impure food, we must provide machinery in the law itself to prevent its becoming an instrument of oppression, and we ought to enable those whose business is threatened with annihilation to have some tribunal and some form of appeal in which they have a complete day in court."

The concluding language of the President of course refers to a day in an *administrative* court before the institution of judicial proceedings, and the inevitable injury therefrom resulting, irrespective of the final outcome, as indicated above.

Equally significant upon this point was the statement of Dr. Alsberg, the distinguished biologist who has recently been appointed by President Taft to the position of Chief of Bureau of Chemistry to succeed Dr. Wiley, and which appears in an interview, evidently authoritative, published in the Philadelphia Public Ledger, Sunday, December 22, 1912. Referring to the necessity for the establishment of food standards, Dr. Alsberg says:

"I believe that most manufacturers and handlers of food stuffs want to do the right thing, but most of them don't know exactly what is the right thing. The whole subject of food inspection and the demand for pure foods is new. When the Bureau of Chemistry was established there were no standards, no guides of any sort. Everything had to be worked out and it's been slow work. Only a few things definitely have been determined for this analysis of foods. To establish standards is not the work of days, but of years. When we arrive at what is the standard then we must show the manufacturer how to bring his products up to the standard."

In some other cases, however, it is to be noted that the Supreme Court has sustained the administrative processes both of seizure *and* destruction. Thus, the Supreme Court has sanctioned a state act⁴⁵ authorizing the summary destruction by any person of fish-nets existing in violation of law, and a lower federal court has also sustained provisions of the customs laws, which have been in force since the first half of the last century, providing for the summary seizure and forfeiture of all smuggled merchandise not exceeding \$500 in value.⁴⁶ In the first of these cases the Supreme Court, curiously enough, placed its decision upon the ground that the property involved was of trifling value, and intimated that if the same had been of great value, it might well be that such a summary power could not be provided; while in the customs case the Court pointed out that the purpose of the Act was to save the government the expense of proceedings for judicial condemnation of property forfeited, in cases where the property was of inconsiderable intrinsic value. In each case it must also be noted that the owner of the property seized was not deprived of a remedy, but that on the one hand he was privileged to retake his nets on bond before destruction, or to sue for their value after seizure, while in the other case he had the privilege of taking his case to court, upon making a proper formal application and protest against the action of the customs officials. In the Food and Drugs Act of 1906, however, we have already noted a radical extension of this principle in the right of the Secretary of Agriculture, in certain cases to cause the destruction of adulterated goods. Since, unlike the customs forfeiture above referred to, no appeal to the courts is provided for in this case, it seems clear that an owner of goods which had been condemned under this provision, and who had refused to export the same, would not be entitled to have the question of misbranding and adulteration reviewed by the court upon a re-taking of the goods by him by legal process, notwithstanding the fact that the provisions made no discrimination based on the value of the goods thus covered. The same observation would apply to the Alaska Seal

⁴⁵ *Lawton v. Steele*, 152 U. S. 133; cf. *Garbage Cases*, 199 U. S. 306 and 325.

⁴⁶ *McGuire v. Winslow*, 26 Fed. 304.

Act,⁴⁷ providing that all seal skins thereafter imported "shall be seized and destroyed by the proper officers of the United States." In the determination of these questions, however, the peculiar control already above referred to, which Congress exercises over the importation of goods, would doubtless have controlling force.

In this connection it is interesting to note that for practical purposes a power of summary seizure is found in the very interesting provisions of the federal statutes relative to the disposition of the effects of deserting seamen. For instance, the law provides for the forfeiture, not only of the wages, but of the clothes and effects left on board a vessel by such deserters and another section of the law⁴⁸ provides that all such clothes and wages, which under the above named section are forfeited for desertion, shall be applied, in the first instance, in payment of the expenses occasioned by such desertion to the master, etc., the balance, if any, to be paid to a United States Shipping Commissioner, to be by him paid over to the Judge of the Circuit Court, who in turn is required in his discretion to pay over any such unclaimed wages to the Treasury of the United States into a fund for the relief of sick and disabled and destitute seamen.

Under this law, it is to be observed that not only does the master have the right summarily to seize *as forfeited* so much of the effects of a seaman as are necessary to discharge the master's claim, but in actual practice the effects and money paid over to the court are, in the absence of any claim, paid directly into the Treasury, without proceedings according to law to obtain a judgment.⁴⁹

Indeed, the entire subject of the jurisdiction and summary powers of United States Shipping Commissioners is one which furnishes a most interesting study in administrative process, and supplies in practice perhaps the most conspicuous justifications of summary process to be found in our entire federal system.

So far as it has come to the attention of the writer, except in the case of the summary destruction of non-mailable matter, which therefore could not be legally delivered, and as to which

⁴⁷ Act Dec. 27, 1897, 30 Stat. L. 226, Sec. 9.

⁴⁸ R. S. 4596, 4604.

⁴⁹ 14, Opinions of Attorney General, 520.

no one could therefore assert a legal claim, the only other provision in the federal system looking to a summary destruction of any property without appeal to the courts, is that which is contained in one or two provisions of the internal revenue laws, such for instance, as the provision that any revenue officer may destroy any emptied cigar boxes upon which an internal revenue stamp may be found, and even in such case as this an aggrieved citizen would, in theory at least, have a remedy by an action which would raise in the courts the issue as to whether the cause for the destruction had existed, since if such cause had not existed the act would have been illegal and subject to redress.

How far Congress will be compelled in the future to resort to administrative process for forfeiture of property cannot now be predicted, but with the large and increasing extension of the Government's responsibilities in the field of interstate commerce, involving the dealing on a large scale with articles, which, to quote the language of the Supreme Court in a recent case under the Food and Drugs Act, are to be looked upon as "outlaws of commerce,"⁵⁰ it is highly probably that we may expect to find a wide, though carefully guarded, extension of this power.

In conclusion, let me venture a few personal observations on the system we have been considering, which are the result of some years' experience in an office which occupies in effect largely the position of intermediary between the administrative and judicial branches of the government.

In the first place, it seems abundantly clear that whatever may have been the attitude of the state courts, the federal courts have placed themselves in the forefront in the firm recognition of the fundamental distinction between administrative functions on the one hand and judicial functions on the other; in other words, in the recognition of the practical exigencies of efficient government, and that we may rest assured that as the extension of federal responsibilities continues, the new methods which experience shall compel us to adopt for the solution of the vast and as yet almost unrealized problems of the future need fear no jealous hindrance from the federal courts, and will find no straight-jacket in the Constitution.

⁵⁰ *Hipolite Egg Company v. U. S.*, 220 U. S. 45, 58 (1911).

In the next place, it is impossible to avoid the conclusion that for all practical purposes the real interests of the citizen in his relation to the federal system must continue to rest more and more in the personal character of those who go to make up the great administrative army of the government. For it is becoming increasingly obvious that administrative methods are fundamentally different from judicial methods and that any attempt to impose administrative and political duties on the courts would in the end surely result in seriously hampering the courts in the conduct of their judicial functions, and must with equal certainty fail in all the essentials of efficient administration.

What the citizen demands in his personal relations with the government is, primarily, efficient and responsible *administration* rather than a carefully elaborated privilege of a resort to "*constant ruinous litigation*" to cure the effects of administrative error.

This situation suggests the inevitable necessity for a new interest in, and study of administrative methods, and a new attitude towards the administrative office and its holder.

Great as are the evils of bureaucracy, their cure is not to be found in the narrowing of administrative responsibilities or in the tightening of judicial control. By responsibility only can we develop efficiency, and what seems to be needed is rather a recognition of the true importance of the administrative system and a scientific study of administrative problems.

It must be clear to all who have studied the historical development of the federal administrative system that, to a large extent, the growth of this system has been hap-hazard, and that many of the various administrative experiments have been devised with little regard for the experience of the past, or to any definite principles of administrative procedure. The result is that some parts of the system are notably more efficient than others, and that little or no attempt has been made to coördinate the whole.

The greatest divergence exists in the matter of departmental appeals and probably the greatest lesson of this entire experience is to be found in the notable success of the higher and more carefully designed administrative tribunals, such for instance as the Interstate Commerce Commission, the Tea Inspection Board

and the Board of General Appraisers. It seems to be the universal experience that where a citizen is afforded the opportunity for a fair and informal submission of his case to one of these great administrative tribunals, where on the one hand the problem is unfettered by the restrictions of judicial procedure, and where on the other he is afforded, and is made to feel that he is afforded, absolutely equal rights with his government, little criticism is heard.

And here let us note with emphasis, that apart from the high character and ability of these tribunals, a character which there should be no difficulty in maintaining in the future, the most hopeful safeguard of such a system, and one which is not always available in the case of purely intra-departmental appeals, is and always should be its unrestricted exposure to the influence of that greatest of all solvents for public ills—PUBLICITY.

But it is equally clear that, coincident with the safeguarding of administrative methods, there must be an awakening to the true importance of the administrative office as such, and a new sense of public responsibility for the development of a broader outlook and freer spirit among the great army of administrative officials upon whose initiation of administrative actions the interests of the citizen for practical purposes really depend.

In a recent study of English political life,⁶¹ Mr. Graham Wallas remarks that "the intellectual life of the government official is becoming part of a problem which every year touches us all more closely."

The observation comes home with special force to America. The judiciary is justly exalted among us; the legislative life is in touch on all sides with the opinions of the day, and on every side is at least afforded the encouragement and opportunity for growth. But not so the men and women in the ranks of the administrative army, whose duty it is to execute the law, and *from whose ranks* must eventually come all the real development and responsibility of the administrative system of the future.

As administrative problems increase in complexity and responsibility just so fast must the great profession of the adminis-

⁶¹ Human Nature in Politics, by Graham Wallas, Constable & Co., London, 1910.

trative official become more and more a matter of special training and of life work, and the efficiency of the system will never lie in the ability of the particular cabinet officer, who from time to time may be the titular head of a Department, but in the solid training and in a very real sense the "intellectual life" of the officials who are growing up in the service.⁵²

It is beyond the scope of this article to discuss the methods which have been suggested or may be suggested for the development or advancement of this administrative life. It is enough to emphasize in closing the vital importance of this personal feature of our great administrative problem.

The traditional integrity of the federal official is the peculiar pride of the federal system. The roots of this integrity lie deep in the principles of civil service and national loyalty. Not moral, or constitutional, or political, are the problems which now confront this great department of our government, but intellectual in the broadest sense. What can we do to stimulate true intellectual progress among the rank and file of the administrative army? How best shall the nation whom they serve so faithfully strive to encourage among them that spirit of intelligent progress, of liberal thought, of free suggestion and hearty coöperation, and of fair-minded, broad-minded protection for the rights of citizen and government alike, that will raise the federal administrative still higher and to the full dignity which it should hold within our

⁵² "But in a Government office as certainly in a law court or laboratory effective thinking will not be done unless adequate opportunities and motives are secured by organization during the whole working life of the appointed officials." Mr. Wallas, *Op. cit.*, p. 261. "But however able our officials are, and however varied their origin, the danger of the narrowness and rigidity which has hitherto so generally resulted from official life would still remain, and must be guarded against by every kind of encouragement to free intellectual development. The German Emperor did good service the other day when he claimed (in a semi-official communication on the Tweedmouth letter) that the persons who are Kings and Ministers in their official capacity have as *Fachmänner* (experts) other and wider rights in the republic of thought. One only wishes that he would allow his own officials after their day's work to regroup themselves, in the healthy London fashion, with labour leaders, and colonels, and school-masters, and court ladies, and members of parliament, as individualists, or theosophists, or advocates of a free stage or a free ritual." Mr. Wallas, *Op. cit.*, pp. 266-267.

state and which will make every position in the government service, what it should be, a post of honor, and the government service itself a career to attract and satisfy the ambitions of the best men and women that our country can produce?

Jasper Yeates Brinton.

Philadelphia, December, 1912.